Lini Feinita bt Muhammad Feisol v Indah Water Konsortium Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO W-02(A)-1932–10 OF 2019
LAU BEE LAN, HADHARIAH SYED ISMAIL AND GUNALAN MUNIANDY JJCA
3 MARCH 2021

Administrative Law — Judicial review — Grounds for judicial review — Illegality, irrationality or procedural impropriety — Whether it was within the purview of the High Court to reassess and revaluate evidence in a judicial review — Whether the Industrial Court had acted irrationally, unreasonably or had taken into account irrelevant considerations or immaterial facts in arriving at its conclusion — Whether the findings of the domestic inquiry were relevant in deciding whether the dismissal was with just cause or excuse — Whether the Industrial Court had committed an error of law that would warrant interference on judicial review

Civil Procedure — Appeal — Fundamental error of law — Termination of employment — Respondent acted contrary to the findings made by its own domestic inquiry panel and dismissed the appellant — Whether the findings of the domestic inquiry were relevant in deciding whether the dismissal was with just cause or excuse — Whether the High Court erred by exceeding its jurisdiction in a judicial review proceeding — Whether the High Court correctly overturned the findings of Industrial Court

Labour Law — Employment — Termination of employment — Domestic Inquiry — Respondent acted contrary to the findings made by its own domestic inquiry panel and dismissed the appellant — Whether the misconduct complained of by the respondent had been established — Whether the misconduct constituted just cause or excuse for the dismissal

This was an appeal by the appellant against the High Court's decision in allowing the respondent's judicial review application to quash the entire decision of the Industrial Court in Award No 3205 of 2018 dated 17 December 2018 ('the award'), with costs. The appellant had commenced her employment with the respondent on 1 March 2004. During her course of employment, she received a show cause letter from the respondent which she replied. Subsequently, the respondent issued a notice of domestic inquiry ('DI') against the appellant whereby seven charges were preferred against the

appellant. The panel for the domestic inquiry ('the DI panel') found the appellant guilty of only the second and third charges. Upon considering the decision of the DI panel that the appellant was also guilty of the second and third charges and the seriousness of all charges as well as the appellant's past record of service, the respondent terminated the appellant's service on 13 May 2017. The appellant, thereafter, filed a representation under s 20 of the Industrial Relations Act 1967 ('the IRA') which was later referred to the Industrial Court ('IC') for adjudication. The Industrial Court handed down the award in favour of the appellant and held that the respondent had failed to show that the appellant was dismissed with just cause or excuse. The respondent was directed to pay the appellant a sum of RM254,784 as back wages as well as for compensation in lieu of reinstatement. The respondent then filed an application for judicial review for an order of certiorari to quash the award. The High Court was of the view, amongst others, that the: (a) finding made by the IC was wrong in law and fact; (b) fact that the respondent had conducted a DI against the appellant was an entirely irrelevant consideration to the issue of whether the appellant had been dismissed without just cause or excuse; and (c) IC failed to give effect to the law that the respondent was entitled to take into account the cumulative effect of all the charges and the past record of service when it decided to impose the punishment of dismissal. Therefore, the High Court judge ('HCJ') allowed the respondent's application for judicial review to quash the award. The decision reinstated the appellant's dismissal from employment with the respondent. Hence the present appeal by the appellant on the ground, inter alia, that the High Court had committed an error of law by exceeding its jurisdiction in a judicial review application to overturn the findings of fact made by the IC which were based on the credibility of witnesses and the evaluation of evidence presented by both parties. The primary issue that arose for determination was whether the HCJ was right in law in the judicial review application to disturb/overturn the purported findings of fact made by the IC.

Held, allowing the appeal; setting aside the decision of the High Court and reinstating the decision of the IC:

(1) The fact that there was a DI in this case and the findings thereof ought to be considered by the IC and unless the decision of the DI could be shown to be perverse, the respondent could not be allowed to reargue its case based on all seven charges to justify the termination in the IC. The decision of the DI panel was indeed a material factor and ought to be considered by the IC notwithstanding that the IC heard the matter afresh and was not bound by the decision or findings of the DI panel and was entitled to make its own finding. Thus, the HCJ had committed a fundamental error of law in holding that the finding of the DI panel should have been completely disregarded by the IC (see paras 30–31).

(2) The court noted that contrary to the DI panel's finding that the appellant was only guilty of a fraction of the seven charges preferred against her, the respondent considered the seriousness of all the seven charges most of which were not proven before the DI panel and the appellant's past record as the basis for imposing the ultimate penalty of termination of service. At the judicial review stage, to allow the respondent to now try to justify the dismissal on all seven charges when the appellant was expressly found not guilty of five out of seven charges would be highly inequitable and unconscionable. It would be akin to allowing the respondent to reintroduce its case at the IC to the detriment of the appellant and defeat the very purpose of the DI process (see paras 36–38).

(3) The primary complaint was that the appellant had allegedly failed to ensure that the Management Development Program ('MDP') and Executive Development Program ('EDP') be completed on time, causing financial loss to the company. In her defence, the appellant took the position that of all material times, she was not the person in charge of these programmes where the discussions were carried out in her absence. The person in charge was, instead, her superior, one En Shahrul Nizam. Her position was also that these programmes had actually been completed on time. Importantly, the DI panel had accepted that there was no delay in the completion of both the MDP and the EDP. The IC, in reviewing the facts and evidence before it, did not find any serious error in the finding of DI panel on this point. However, the respondent chose to unilaterally reassess these charges in arriving at its decision to dismiss the appellant contrary to the DI panel's verdict. It appeared that the High Court had made a factually wrong finding that there was a delay of two years in the completion of the Management Development Program ('MDP') which was contrary to the totality of the evidence adduced to the IC. The finding must, therefore, be considered wrong in principle for being perverse and factually baseless (see para 41–43 & 45).

(4) It was plain that the IC had given serious consideration to the issue of proportionality of the punishment which was consistent with its role under a s 20 of the Industrial Relations Act 1967 reference. It was not shown that the IC had acted irrationally, unreasonably or had taken into account irrelevant considerations or immaterial facts in arriving at its conclusion. Therefore, the court was of the view that there was no flaw or manifest error in the approach taken by the IC and the conclusion reached as adverted to. The court however agreed with the HCJ that the law on judicial review was now well settled that the court may review a decision of a public authority in the exercise of public duty or function on the grounds of illegality, irrationality or procedural impropriety. The court however, did not agree with the HCJ that the IC had committed an error of law in its award that warranted interference on judicial review (see paras 73–74 & 76).

(5) It was erroneous for the HCJ to reassess the IC's finding of fact that was not shown to be plainly wrong or wrong in principle and come to a contrary conclusion on the ground that there was enough evidence before the IC including the appellant's past record of service, to uphold her dismissal. The HCJ had nowhere in her judgment explained as to how the IC had acted unreasonably or irrationally in its evaluation of the evidence of both parties and the approach that it had taken in its findings on the appellant's dismissal. Merely expressing the view that the IC had erred in fact and law when making its findings when there was enough evidence of the appellant's past record of service from the witnesses called by the respondent would not, in principle, be sufficient ground to disturb the finding of the decision maker who was entrusted to conduct an inquiry into the complaints made by the employer against the employee (paras 84–86).

(6) In a judicial review, it was not within the purview of the High Court to reassess and revaluate the evidence which was the function of the decision maker. The IC was entirely correct in holding that the respondent was not entitled to reassess all the charges preferred against the appellant at the DI and dismiss her based on the same without producing evidence to contradict the findings of the DI panel. It would, otherwise, have the effect of finding the appellant guilty of all seven charges in direct contradiction to the said findings which the IC was right to reject consistent with equity and good conscience. Also, the HCJ had erred in principle when she held that the IC had given too much weight on finding an appropriate punishment for respondent disregarding the most important consideration that the appellant had been holding the position of manager for about 13 years in the Human Resource Department, the past adverse record of service and consequence of her acts and omissions to the company (paras 88–91).

(7) The HCJ's finding was in conflict with the second primary function of the IC being to decide whether the proven misconduct constituted just cause or excuse to justify the dismissal. The IC's decision that the most severe penalty of dismissal was without justification was not flawed or a serious error that merited interference by the High Court based on its finding on the nature of the misconduct and the facts and circumstances of this case (paras 92 & 94).

(8) The IC was clearly entitled to take the view that the appellant's oversight or omission was not a serious misconduct and decided the appropriate penalty for the same. It was common ground that the appellant had served the respondent for a continuous period of 13 years at the time of her dismissal. The IC had correctly considered this material fact and invoked the doctrine of proportionality to hold that the appellant's dismissal by the respondent was unduly harsh, unreasonable and wholly

disproportionate to the offence committed by the appellant. The HCJ appeared to have erroneously failed to direct her mind to the application of this important doctrine in reversing the IC's decision on the penalty of dismissal. Therefore, the High Court clearly fell into error by exceeding its jurisdiction in a judicial review proceeding by overturning the findings of fact by the IC which were not tainted with any manifest errors of law or fact (paras 95–97 & 100).

[Bahasa Malaysia summary

Ini adalah rayuan oleh perayu terhadap keputusan Mahkamah Tinggi yang membenarkan permohonan semakan kehakiman responden untuk membatalkan keseluruhan keputusan Mahkamah Perusahaan dalam Award No 3205 Tahun 2018 bertarikh 17 Disember 2018 ('award tersebut'), beserta kos. Perayu telah memulakan pekerjaannya dengan responden pada 1 Mac 2004. Selama tempoh pekerjaannya, beliau telah menerima surat tunjuk sebab daripada responden yang mana beliau telah jawab. Selanjutnya, responden mengeluarkan notis siasatan dalaman ('DI') terhadap perayu yang mana tujuh pertuduhan telah dirujuk terhadap perayu. Panel bagi siasatan dalaman ('panel DI') mendapati perayu hanya bersalah atas pertuduhan kedua dan ketiga. Setelah mempertimbangkan keputusan panel DI bahawa perayu juga bersalah atas pertuduhan kedua dan ketiga dan kesemua pertuduhan yang berat serta rekod perkhidmatan perayu yang lalu, responden menamatkan perkhidmatan perayu pada 13 Mei 2017. Perayu, selepas itu, mengemukakan representasi di bawah s 20 dari Akta Perhubungan Perusahaan 1967 ('APP') yang kemudian dirujuk ke Mahkamah Perusahaan ('MP') untuk dibicarakan. Pihak Mahkamah Perusahaan membenarkan award bagi pihak perayu dan memutuskan bahawa responden telah gagal menunjukkan bahawa perayu diberhentikan dengan sebab atau alasan yang adil. Responden diarahkan untuk membayar perayu sejumlah RM254,784 untuk tunggakan gaji serta pampasan sebagai penggantian perkhidmatan. Responden kemudian memfailkan permohonan semakan kehakiman untuk perintah certiorari untuk membatalkan award tersebut. Mahkamah Tinggi berpendapat, antara lain, bahawa: (a) dapatan yang dibuat oleh MP adalah terkhilaf dari segi undang-undang dan fakta; (b) fakta bahawa responden telah menjalankan DI terhadap perayu adalah pertimbangan yang sama sekali tidak wajar dengan isu sama ada perayu telah diberhentikan tanpa sebab atau alasan yang adil; dan (c) MP gagal mengambil kesan undang-undang bahawa responden berhak untuk mempertimbangkan kesan kumulatif atas kesemua pertuduhan dan rekod perkhidmatan yang lalu apabila memutuskan untuk menjatuhkan hukuman pemecatan. Oleh itu, Hakim Mahkamah Tinggi ('HMT') membenarkan permohonan responden untuk semakan kehakiman bagi membatalkan award tersebut. Keputusan tersebut mengembalikan semula perayu pada perkhidmatannya dengan responden. Oleh itu, rayuan semasa oleh perayu atas alasan, antara lain, bahawa Mahkamah Tinggi telah melakukan kekhilafan undang-undang dengan melangkaui bidang kuasa dalam permohonan

semakan kehakiman untuk mengakas dapatan fakta yang dibuat oleh MP yang berdasarkan kredibiliti saksi dan penilaian keterangan yang dikemukakan oleh kedua-dua pihak. Isu utama yang timbul untuk ditentukan adalah sama ada HMT tepat dari segi undang-undang dalam permohonan semakan kehakiman untuk mengganggu/mengakas dapatan fakta yang dibuat oleh MP.

Diputuskan, membenarkan rayuan; mengetepikan keputusan Mahkamah Tinggi dan mengembalikan semula keputusan MP:

(1) Fakta bahawa terdapat DI dalam kes ini dan dapatannya harus dipertimbangkan oleh MP dan melainkan sekiranya keputusan DI dapat dilihat sebagai tersalah arah, responden tidak boleh dibenarkan untuk menghujahkan kembali kesnya berdasarkan kesemua tujuh pertuduhan dalam memberikan justifikasi penamatan tersebut dalam MP. Keputusan panel DI sememangnya merupakan faktor material dan harus dipertimbangkan oleh MP walaupun MP mendengar perkara tersebut secara baru dan tidak terikat dengan keputusan atau dapatan panel DI dan berhak membuat dapatannya sendiri. Oleh itu, HMT telah melakukan kekhilafan undang-undang asas dengan menyatakan bahawa dapatan panel DI seharusnya ditolak dengan terus oleh MP (lihat perenggan 30–31).

(2) Mahkamah menyatakan bahawa bertentangan dengan dapatan panel DI bahawa perayu hanya bersalah atas sebilangan kecil dari tujuh pertuduhan yang dirujuk terhadapnya, responden menganggap kesemua tujuh pertuduhan begitu berat yang kebanyakannya tidak dibuktikan di hadapan panel DI dan rekod lampau perayu sebagai asas untuk menjatuhkan hukuman muktamad dengan penamatan perkhidmatan tersebut. Pada peringkat semakan kehakiman, bagi membolehkan responden sekarang berusaha untuk memberikan justifikasi pemecatan atas kesemua tujuh pertuduhan tersebut apabila perayu secara nyata didapati tidak bersalah terhadap lima dari tujuh pertuduhan tersebut adalah sangat tidak adil dan tidak dapat dipertimbangkan. Ianya sama dengan membenarkan responden untuk memperkenalkan semula kesnya di MP yang akan merugikan perayu dan mengalahkan tujuan proses DI (lihat perenggan 36–38).

(3) Aduan utama adalah bahawa perayu didakwa telah gagal memastikan bahawa Program Pembangunan Kepimpinan ('MDP') dan Program Pembangunan Eksekutif ('EDP') untuk diselesaikan tepat pada waktunya, menyebabkan kerugian kewangan kepada syarikat. Dalam pembelaannya, perayu mengambil keputusan bahawa sepanjang masa yang material, beliau bukannya orang yang bertanggungjawab atas program-program ini yang mana perbincangan dilakukan tanpa kehadiran beliau. Sebaliknya, orang yang bertanggungjawab adalah pegawai atasannya, En Shahrul Nizam. Kedudukannya juga bahawa

program-program ini sebenarnya telah diselesaikan tepat pada waktunya. Yang penting, panel DI telah menerima bahawa tidak ada kelewatan dalam menyelesaikan MDP dan EDP. MP, dalam menyemak fakta dan keterangan di hadapannya, tidak menemui kesalahan serius dalam dapatan panel DI mengenai perkara ini. Walau bagaimanapun, responden memilih untuk menilai semula pertuduhan ini secara sepihak dalam membuat keputusan untuk memecat perayu bertentangan dengan keputusan panel DI. Ianya jelas bahawa Mahkamah Tinggi telah membuat dapatan fakta yang salah bahawa terdapat kelewatan selama dua tahun dalam penyelesaian Program Pembangunan Kepimpian ('MDP') yang mana bertentangan dengan keseluruhan keterangan yang dikemukakan kepada MP. Oleh itu, dapatan tersebut mesti dianggap salah pada prinsipnya kerana tersalah arah dan tidak berasas (lihat perenggan 41–43 & 45).

(4) Sudah jelas bahawa MP telah mempertimbangkan dengan serius mengenai isu kesaksamaan hukuman yang bersesuaian dengan peranannya di bawah s 20 Akta Perhubungan Perusahaan 1967. Ianya tidak dibuktikan bahawa MP telah bertindak secara tidak rasional, tidak wajar atau telah mengambil kira pertimbangan yang tidak relevan atau fakta tidak material dalam membuat kesimpulannya. Oleh itu, mahkamah berpendapat bahawa tidak ada kesalahan atau kekhilafan nyata dalam pendekatan yang diambil oleh MP dan kesimpulan yang dicapai seperti yang telah ditetapkan. Mahkamah bagaimanapun bersetuju dengan HMT bahawa undang-undang mengenai semakan kehakiman sekarang adalah tetap sehingga mahkamah dapat menyemak keputusan suatu undang-undang awam dalam menjalankan tugas atau fungsi awam dengan alasan ketidaksahan, ketidakwajaran atau ketidaksuaian prosedur. Mahkamah bagaimanapun, tidak bersetuju dengan HMT bahawa MP telah melakukan kekhilafan undang-undang dalam awardnya yang membenarkan campur tangan dalam semakan kehakiman (lihat perenggan 73–74 & 76).

(5) Ianya adalah terkhilaf bagi HMT untuk menilai dapatan fakta MP yang tidak terbukti salah pada nyatanya atau salah pada prinsipnya dan sampai kepada kesimpulan yang bertentangan dengan alasan bahawa keterangan yang mencukupi di hadapan MP termasuk rekod perkhidmatan masa lalu perayu, untuk mengekalkan pemecatannya. Dalam keputusannya, HMT tidak menjelaskan bagaimana MP bertindak secara tidak wajar atau tidak rasional dalam penilaiannya terhadap keterangan kedua-dua pihak dan pendekatan yang diambilnya dalam dapatannya terhadap pemecatan perayu. Dengan hanya menyatakan pandangan bahawa MP telah terkhilaf pada fakta dan undang-undang dalam membuat dapatannya apabila terdapat keterangan yang mencukupi mengenai rekod perkhidmatan perayu yang lalu dari saksi yang dipanggil oleh responden tidak akan, secara prinsip, menjadi alasan yang cukup untuk

mengganggu dapatan pembuat keputusan yang diamanahkan untuk menjalankan siasatan terhadap aduan yang dibuat oleh majikan terhadap pekerja tersebut (lihat perenggan 84–86).

(6) Dalam satu semakan kehakiman, ia bukan dalam bidang tugas Mahkamah Tinggi untuk menyemak kembali dan menilai kembali keterangan yang merupakan fungsi pembuat keputusan. MP telah dengan tepat dalam memutuskan bahawa responden tidak berhak menilai semula kesemua pertuduhan yang dirujuk terhadap perayu di DI dan memberhentikannya berdasarkan perkara yang sama tanpa mengemukakan keterangan yang bertentangan dengan dapatan panel DI. Ia akan, sebaliknya, mempunyai kesan dengan mendapati perayu bersalah atas kesemua tujuh pertuduhan yang secara langsung bertentangan dengan dapatan tersebut yang mana MP telah dengan tepat menolak bersesuaian dengan keadilan dan suci hati. Selain itu, HMT telah terkhilaf pada prinsipnya apabila beliau memutuskan bahawa MP telah terlalu menitik beratkan dalam mencari hukuman yang sesuai untuk responden mengabaikan pertimbangan yang paling penting bahawa perayu telah memegang jawatan sebagai pengurus selama kira-kira 13 tahun di Jabatan Sumber Manusia, rekod perkhidmatan lampau buruk dan akibat tindakan dan kesilapannya pada syarikat (lihat perenggan 88–91).

(7) Dapatan HMT bertentangan dengan fungsi utama kedua MP iaitu dalam memutuskan sama ada salah laku yang dibuktikan merupakan satu sebab atau alasan adil untuk membenarkan pemecatan tersebut. Keputusan MP bahawa hukuman pemecatan yang paling berat adalah tanpa justifikasi tidak salah atau kekhilafan serius yang memerlukan campur tangan oleh Mahkamah Tinggi berdasarkan dapatannya mengenai sifat salah laku dan fakta dan keadaan kes ini (lihat perenggan 92 & 94).

(8) MP jelas mempunyai hak untuk mengambil pendekatan bahawa kelalaian atau kesilapan perayu bukanlah suatu kesalahan yang serius dan memutuskan hukuman yang setimpal untuknya. Sudah menjadi alasan umum bahawa perayu telah berkhidmat kepada responden secara berterusan selama 13 tahun sehingga saat pemecatannya. MP telah dengan tepat mempertimbangkan fakta material ini dan mengguna pakai doktrin kesaksamaan untuk memutuskan bahawa pemecatan perayu oleh responden adalah sangat kasar, tidak wajar dan sama sekali tidak bersesuaian dengan kesalahan yang dilakukan oleh perayu. HMT tampaknya secara khilaf gagal mengarahkan pemikirannya ke arah penggunaan doktrin penting ini dalam mengakas keputusan MP terhadap hukuman pemecatan. Oleh itu, Mahkamah Tinggi jelas terkhilaf dengan melangkaui bidang kuasanya dalam semakan kehakiman dengan mengakas dapatan fakta oleh MP yang mana tidak

tercemar dengan kekhilafan undang-undang atau fakta yang nyata (lihat perenggan 95–97 & 100).]

Cases referred to

Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal [1995] 2 MLJ 770, CA (refd)

Bumiputra Commerce Bank Berhad v Mahkamah Perusahaan Malaysia & Anor [2004] 7 MLJ 441; [2004] 7 CLJ 77, HC (folld)

Goon Kwee Phoy v J & P Coats (M) Bhd [1981] 2 MLJ 129, FC (refd)

Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal [1996] 1 MLJ 481, CA (refd)

Malaysian Oxygen Bhd v Soh Tong Wah and another appeal [2015] 3 MLJ 730, CA (refd)

Milan Auto Sdn Bhd v Wong Seh Yen [1995] 3 MLJ 537; [1995] 4 CLJ 449, FC (refd)

Norizan bin Bakar v Panzana Enterprise Sdn Bhd [2013] 6 MLJ 605; [2013] 9 CLJ 409, FC (refd)

Peguam Negara Malaysia v Chin Chee Kow (as secretary of Persatuan Kebajikan dan Amal Liam Hood Thong Chor Seng Thuan) and another appeal [2019] 3 MLJ 443; [2019] MLJU 202, FC (refd)

Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd [2010] 6 MLJ 1, FC (refd)

Standard Chartered Bank Malaysia Berhad v Yun Koon Ming [2006] 4 ILR 2637, IC (folld)

Telekom Malaysia Kawasan Utara v Krishnan Kutty a/l Sanguni Nair & Anor [2002] 3 MLJ 129; [2002] 3 CLJ 314, CA (refd)

Wong Yuen Hock v Syarikat Hong Leong Assurance Sdn Bhd and another appeal [1995] 2 MLJ 753, FC (refd)

Legislation referred to

Industrial Relations Act 1967 s 20

Appeal from: Judicial Review No WA-25–93–02 of 2019 (High Court, Kuala Lumpur)

Alex De Silva (Tan Wan Qian with him) (Bodipalar Ponnudurai De Silva) for the appellant.

TM Varughese (TM Varughese & Co) for the respondent.

Gunalan Muniandy JCA:

INTRODUCTION

[1] This is an appeal by the appellant/employee against the High Court's decision on 30 September 2019 in allowing the respondent company's judicial

review application to quash the entire decision of the Industrial Court in Award No 3205 of 2018 dated 17 December 2018 ('the award'), with costs of RM3,000. The decision reinstated the appellant's dismissal from employment with the respondent.

BACKGROUND FACTS

[2] The appellant commenced her employment with the respondent on 1 March 2004 as Manager of Compensation, Benefits & Record (Grade 4) in the Human Resources Department. Thereafter, the appellant was redesignated to the position of Manager of Training & Development effective from 16 July 2007. The appellant continued to be a manager in the same post until her termination on 13 May 2017.

[3] On 6 January 2017, the respondent sent a show cause letter to the appellant and requested for an explanation for all charges of misconduct levelled against her. On 12 January 2017, the appellant replied the said show cause letter. On 13 March 2017, the respondent issued a notice of domestic inquiry ('DI') against the appellant. The DI was conducted on 27 March 2017. Seven charges were preferred against the appellant.

[4] The panel of domestic inquiry ('the DI panel') found the appellant guilty of the second and third charges only. The appellant admitted guilt for the third charge only. Upon considering the decision of the DI panel that the appellant was also guilty of the second and third charges and the seriousness of all charges as well as the appellant's past record of service, the respondent decided to terminate the appellant's service on 13 May 2017.

[5] The appellant, thereafter, filed a representation under s 20 of the Industrial Relations Act 1967 ('the IRA'), which was later been referred to the Industrial Court for adjudication by the Minister on 10 November 2017. After hearing both parties, the Industrial Court on 17 December 2018 handed down the award in favour of the appellant and held that the respondent had failed to show that the appellant was dismissed with just cause or excuse. The respondent was directed to pay the appellant a sum of *RM254,784* as back wages as well as for compensation in lieu of reinstatement.

[6] The respondent filed an application for judicial review for an order of certiorari to quash the Industrial award dated 17 December 2018.

[7] On 30 September 2019, the learned High Court judge ('the LHCJ') allowed the respondent's application for judicial review to quash the Industrial Court award dated 17 December 2018 with costs of RM3,000 subject to payment of allocator.

HIGH COURT'S DECISION

[8] The LHCJ's considered view was that the finding made by the Industrial Court ('IC') was wrong in law and fact. The company she held did give effect to the DI panel's finding of guilty of two out of the seven charges and in addition to the two charges, took into account the seriousness of all the charges and the appellant's past adverse record of service in deciding the appropriate punishment to be imposed on the appellant.

[9] The LHCJ also found that the fact that the respondent had conducted a DI against the appellant is an entirely irrelevant consideration to the issue whether the appellant had been dismissed without just cause or excuse. The findings of a DI are not binding upon the IC which rehears the matter afresh. However, the IC may take into account the fact that a DI had been held when determining whether the appellant was lawfully dismissed. There was enough evidence before the IC about the appellant's past record of service to justify her dismissal.

[10] The IC failed to consider and disregarded a series of warning letters and a lighter punishment imposed on the appellant earlier and its cumulative effect. Based on the disciplinary actions taken against the appellant, the IC had wrongly concluded that her record had been largely unblemished. The IC had erred in law when it made the above findings and conclusion. The IC failed to give effect to the law that the company is entitled to take into account the cumulative effect of all the charges and the past record of service when it decided to impose the punishment of dismissal.

THE APPELLANT'S SUBMISSION

[11] Counsel for the appellant submitted that the High Court ought not to disturb the findings of fact made by the IC unless they were grounded on illegality or plain irrationality. The High Court, therefore, had committed an error of law by exceeding its jurisdiction in a judicial review application to overturn the findings of fact made by the IC which were based on the credibility of witnesses and evaluation of evidence presented by both parties.

[12] Both parties, the DI panel had found the appellant not guilty of charges 1, 4, 5, 6 and 7. However, the respondent decided to reassess all the charges and dismiss the appellant based on the same. In doing so, the respondent had unilaterally decided that the appellant was guilty of all the charges in direct contravention of the findings made by the DI panel. However, there was no evidence produced by the respondent during the trial in the IC which suggested that the findings by the DI panel were perverse. The IC made a finding of fact that the respondent had failed to produce any evidence to show

why it did not wish to be bound by the findings of the DI panel. The High Court had fallen into error when it found that the DI's findings were irrelevant.

[13] Counsel for the respondent submitted that there were no findings made by the IC based on credibility of witnesses which the High Court judge was wrong to disturb. All the findings were based on documentary evidence at the trial. The LHCJ applied the correct Industrial law jurisprudence in relation to termination of an employee and applied 'equity and good conscience'.

[14] The LHCJ did not commit any error of law or fact as Her Ladyship did consider the applicable law and quoted correctly case authorities of superior courts and the legal principles, including 'illegality', 'irrationality' and 'procedural impropriety' as referred to in the grounds of judgment.

[15] Counsel for the respondent further submitted that the LHCJ did not commit any error of law or fact when she took cognizance of the numerous warning letters, letters of caution and other disciplinary actions taken against the appellant prior to the termination. The appellant did not raise any issue on these actions with the management at any time, including under the grievance procedure existing in the company or at all. After having undergone various lighter punishments in the past and considering the seriousness of the current seven charges, the punishment of termination imposed is fair and reasonable. Any other reasonable employer in similar circumstances would have imposed such a punishment.

OUR DECISION

[16] It has to be reiterated at the outset that the domestic inquiry ('DI') convened by the respondent on 27 March 2017 preceding the termination letter dated 12 May 2017 terminating the appellant's employment wef 13 May 2017 found the appellant guilty of only two of the seven charges preferred against her. These were charges two and three.

[17] The first and primary issue that calls for our determination is whether the LHCJ was right in law in the judicial review application to disturb/overturn the purported findings of fact made by the IC.

[18] It was contended by the appellant that the LHCJ was wrong in doing so as the challenge to the IC's decision was not grounded on illegality or plain irrationality notwithstanding that the High Court did not agree with the conclusion reached by the IC on the issue of wrongful dismissal.

[19] A leading authority on this area of the law is *Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd* [2010] 6 MLJ 1 where the Federal Court

pronounced that:

> [15] We find that there is merit on the submission advanced by learned counsel for the respondent. Historically, judicial review was only concerned with the decision making process where the impugned decision is flawed on the ground of procedural impropriety. However, over the years, our courts have made inroad into this field of administrative law. *Rama Chandran* is the mother of all those cases. The Federal Court in a landmark decision has held that the decision of inferior tribunal may be reviewed on the grounds of 'illegality', 'irrationality' and possibly 'proportionality' which permits the courts to scrutinise the decision not only for process but also for substance. It allowed the courts to go into the merit of the matter. Thus, the distinction between review and appeal no longer holds.
>
> [16] The *Rama Chandran* decision has been regarded or interpreted as giving the reviewing court a license to review without restrain decisions for substance even when the said decision is based on finding of facts. However, post *Rama Chandran* cases have applied some brakes to the courts' liberal approach in *Rama Chandran.* The Federal Court in the case of *Kumpulan Perangsang Selangor Bhd v Zaid bin Hj Mohd Noh* [1997] 1 MLJ 789; [1997] 2 CLJ 11 after affirming the *Rama Chandran* decision held that there may be cases in which for reason of public policy, national interest, public safety or national security the principle in *Rama Chandran* may be wholly inappropriate.
>
> [17] The Federal Court, in *Petroliam Nasional Bhd v Nik Ramli Nik Hassan* [2004] 2 MLJ 288; [2003] 4 CLJ 625, again held that the reviewing court may scrutinise a decision on its merits but only in the most appropriate of cases and not every case is amenable to the *Rama Chandran* approach. Further, it was held that a reviewing judge ought not to disturb findings of the IC unless they were grounded on illegality or plain irrationality, even where the reviewing judge might not have come to the same conclusion.
>
> [18] The Court of Appeal has in a number of cases held that where finding of facts by the IC are based on the credibility of witnesses, those findings should not be reviewed (see *William Jacks & Co (M) Sdn Bhd v S Balasingam* [2000] 7 MLJ 1; [1997] 3 CLJ 235; *National Union of Plantations Workers v Kumpulan Jerai Sdn Bhd, Rengam* [2000] 2 MLJ 144; [2000] 1 CLJ 681; *Quah Swee Khoon v Sime Darby Bhd* [2000] 2 MLJ 600; [2001] 1 CLJ 9; *Colgate Palmolive (M) Sdn Bhd v Yap Kok Foong and another appeal* [2001] 4 MLJ 97; [2001] 3 CLJ 9). However, there are exceptions to this restrictive principle where:
>
> (a) reliance upon an erroneous factual conclusion may itself offend against the principle of legality and rationality; or
>
> (b) there is no evidence to support the conclusion reached.
>
> (see *Swedish Motor Assemblies Sdn Bhd v Haji Mohd Ison bin Baba* [1998] 2 MLJ 372; [1998] 3 CLJ 288)

[20] The above position was reaffirmed by the Court of Appeal in the case of *Malaysian Oxygen Bhd v Soh Tong Wah and another appeal* [2015] 3 MLJ 730 where it was held as follows:

> [21] The statement was made in the context of the unfolding of the nature of judicial review over time through case law where judicial review is no longer confined to flawed process, and the further grounds identified required scrutiny of the decision not only for process but also for substance ...
>
> [22] Thus, *Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd* cannot be read as having eliminated the distinction between judicial review and an appeal entirely.
>
> ...
>
> [24] Scrutiny for substance involves examination of findings of fact. The extent to which the court can review findings of fact of a tribunal has the same practical limitations as in an appeal from a trial court:
>
> > (b) The High Court in judicial review is in no position to reassess a finding of fact that is an assessment of credibility, including relative credibility of witnesses seen and heard giving testimony and tested on that testimony before the tribunal. See *Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd* ...
>
> (see also the Court of Appeal's decision in *Robin Khoo Kah Chong v Logik Pengurusan Sdn Bhd* [2018] MLJU 463; [2018] 1 LNS 469)

[21] We are, unanimously, of the considered view that the High Court, as correctly contended by the appellant, had committed a fundamental error of law by exceeding its jurisdiction in a judicial review application in proceeding to overturn the findings of fact made by the court of first instance, namely, the IC which were based on the credibility of witnesses and an analysis of evidence adduced before it. It was indeed a reassessment of the IC's assessment of credibility of witnesses' evidence and findings of fact arrived at by the IC.

[22] We would now state the reasons for our decision. The appellant, amongst others, relied on the trite law principle that in dismissal/termination cases, the burden lies with the employer to prove, on a balance of probabilities, that the employee's dismissal was with just cause or excuse. As such, if the employer fails to do so, the inevitable conclusion would be that the dismissal was without just cause or excuse.

[23] In support thereof, the appellant cited the Federal Court case of *Goon Kwee Phoy v J & P Coats (M) Bhd* [1981] 2 MLJ 129 where at p 136 H-I left column it was held as follows:

> Where representations are made and are referred to the Industrial Court for enquiry, it is the duty of that court to determine whether the termination or dismissal is with or without just cause or excuse. *If the employer chooses to give a reason for the action taken by him, the duty of the Industrial Court will be to enquire whether that excuse or reason has or has not been made out. If it finds as a fact that it has not been proved, then the inevitable conclusion must be that the termination or dismissal was without just cause or excuse.* The proper enquiry of the court is the reason advanced by it and that court or the High Court cannot go into another reason not relied on by the

A employer or find one for it. (Emphasis added.)

[24] We concur with the appellant's contention that the correct legal position is that in a case where no DI was held by the employer prior to the employee's dismissal, the IC is entitled to take the position that such non-convening of the DI will not be fatal to the employer's case since the IC has the jurisdiction to rehear the matter *de novo* (see the Federal Court's decision in *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal* [1996] 1 MLJ 481)

[25] Conversely, where a DI is held by the employer, the IC is duty bound to consider the findings made by the DI panel in deciding whether the employee's dismissal was with just cause or excuse. In this regard, the IC should not proceed to hear the matter *de novo.* In this regard, we agree with the High Court in *Bumiputra Commerce Bank Berhad v Mahkamah Perusahaan Malaysia & Anor* [2004] 7 MLJ 441; [2004] 7 CLJ 77 where Raus Sharif, J (as he then was) held as follows:

> *The Industrial Court's jurisdiction, in instances where a domestic inquiry has been held, was limited to considering whether there was a prima facie case against an employee*.
>
> Thus, in the present case, the Industrial Court should have first considered whether or not the domestic inquiry was valid and the inquiry notes accurate. In the absence of such considerations, the Industrial Court's action in proceeding to decide the matter without any regard to the notes of inquiry could not be described as anything more than an error of law. Accordingly, the conclusion of the Industrial Court that all charges preferred against the second respondent were not proven could not be supported and was, in fact, contrary to the clear evidence of the case. *Since it was apparent from the records that the Industrial Court had misconstrued and misapplied the principles of law pertaining to the relevance of a valid domestic inquiry this court was compelled to exercise its powers of judicial review to issue an order of certiorari to quash the award*. (Emphasis added.)

[26] A major point advanced by the appellant in this appeal is that the respondent acted contrary to the findings made by its own DI panel. This would be evident from the chronology of events as below:

(a) the DI panel had found the appellant not guilty of charges (1), (4), (5) and (6);

(b) despite the findings, the respondent, nevertheless, proceeded to reassess all the charges and evidence before deciding to dismiss the appellant based on the said charges and same evidence; and

(c) effectively, the respondent, had decided to find the appellant guilty of all the charges without giving any further opportunity to be heard.

[27] It was pointed out by the appellant that at the IC trial, the respondent omitted to adduce any evidence that the findings and decision of the DI panel were perverse, unreasonable or irrational. Hence, the finding of the IC that the respondent had failed to show why it did not wish to be bound by the findings of the DI panel.

[28] However, in the present case, the LHCJ held a different view and in reversing the finding of fact by the IC held that 'the fact that company has conducted a domestic inquiry against the respondent is an entirely irrelevant consideration to the issue whether the latter had been dismissed without just cause or excuse'.

[29] The appellant's contention is that this was a fundamental error by the LHCJ as it goes against the established legal principles pertaining to the relevance of a domestic inquiry in industrial jurisprudence.

[30] We are in agreement with the appellant that, applying the cases of *Bumiputra Commerce Bank* case and *Standard Chartered Bank Malaysia Berhad v Yun Koon Ming* [2006] 4 ILR 2637 the fact there was a DI in this case and the findings thereof ought to be considered by the IC and unless the decision of the DI can be shown to be perverse, the respondent cannot be allowed to reargue its case based on all seven charges to justify the termination in the IC. We further agree that the decision of the DI panel is indeed a material factor and ought to be considered by the IC notwithstanding that the IC hears the matter afresh and is not bound by the decision or findings of the DI panel and is entitled to make its own finding.

[31] We are, thus, of the view that the LHCJ had committed a fundamental error of law in holding that the finding of the DI panel's decision should have been completely disregarded by the IC.

[32] It would appear without doubt that the respondent took into account not only the two charges of which the appellant had been found guilty by the DI panel but all the charges which the respondent considered serious.

[33] This is apparent from the LHCJ's grounds of judgment where she concluded that:

> The company did give effect to the DI panel's findings of guilty of two out of the seven charges *and in addition* to the two charges took into account the seriousness of all the charges and the respondent's past adverse record of service in deciding the appropriate punishment imposed on the respondent. (Emphasis added.)

[34] Likewise, from the termination letter issued to the appellant that reads

as follows:

> Alter careful consideration of the facts deliberated and *seriousness of the charges* and *also taking into account your previous record of service*, the company has decided to terminate your services with immediate effect. Your last day of employment is 12 May 2017 and you cease employment with the company with effect from 13 May 2017.
>
> It is obvious that the termination letter refers to the charges and not charge No 2 and charge No 3 as decided by the Di.

[35] Contrary to the appellant's contention, the respondent did not agree that the LHCJ had erred in law as she had followed the legal principles quoted in the two authorities referred to. According to the respondent, the LHCJ's view that 'the fact that a domestic inquiry was conducted is an entirely irrelevant consideration to the issue' is merely a quotation from the Court of Appeal case of *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal*, and she did in fact consider the fact that the DI panel found the appellant/claimant guilty of charges Nos 2 and 3 only out of the seven charges.

[36] Be that as it may, we note that contrary to the DI panel's finding that the appellant/claimant was only guilty of a fraction of the seven charges preferred against her, the respondent considered the seriousness of all the seven charges most of which were not proven before the DI panel and the appellant's past record as the basis for imposing the ultimate penalty of termination of service.

[37] We are inclined to accept the appellant's contention that, at the judicial review stage, to allow the respondent to now try to justify the dismissal on all seven charges when the appellant was expressly found not guilty of five out of seven charges would be highly inequitable and unconscionable.

[38] It would be akin to allowing the respondent to reintroduce its case at the IC to the detriment of the appellant and defeat the very purpose of the DI process.

[39] In justifying the High Court's decision to quash the IC award, the respondent listed down several errors of law and fact in the impugned award, inter alia:

(a) the award concluded wrongly that the respondent company failed to give effect to the DI panel's findings;

(b) the IC made a finding that the company did not present any evidence as to the reasons it does not want to be bound by the findings of the DI panel;

(c) the IC failed to consider the claimant's past adverse records of service and evidence adduced to that effect at the trial;

(d) the IC failed to take note of the claimant's serious omission to get the employment bonds executed by 12 participants of the MDP/EDP programmes. This has resulted in the company not being able to enforce the bond when four participants left the service resulting in financial loss to the company;

(e) the IC failed to consider the consequences/impact of the claimant's failure of keeping the certificates of completion of 28 MDP participants under her custody for a period of 12 months without even informing her superior ie COW1;

(f) the IC made a wrong and unreasonable finding that there was no contributory conduct on the part of the claimant, leading to her termination; and

(g) the IC concluded that in spite of series of adverse past record of service 'her record has been largely unblemished.

[40] Of utmost importance for our consideration is the fact that the appellant's service was terminated based on the severity of a majority of the charges, ie charges 1, 4, 5 and 6.

[41] In respect of these charges, the primary complaint was that the appellant had allegedly failed to ensure that the Management Development Program ('MDP') and Executive Development Program ('EDP') be completed on time, as a result of which it had caused these programmes to overrun their time of completion as scheduled caused financial loss to the company.

[42] In her defence, the appellant took the position that of all material times, she was not the person in charge of these programmes where the discussions were carried out in her absence. The person in charge was, instead, her superior, one En Shahrul Nizam. Her position was also that these programmes had actually been completed on time.

[43] Importantly, the DI panel had accepted that there was no delay in the completion of both the MDP and the EDP. The IC, in reviewing the facts and evidence before it, did not find any serious error in the finding of DI panel on this point. However, the respondent chose to unilaterally reassess these charges in arriving at its decision to dismiss the appellant contrary to the DI panel's verdict.

[44] The appellant highlighted to us the admission of the respondent's own witness ('COW2'), one of the participants of the MDP, at the IC that the

programme was completed on time. This fact was fortified by the wording in charge 2 at the DI which expressly stated the completion time to be sometime in May 2015.

[45] It would, thus, appear that the High Court had made a factually wrong finding that there was a delay of two years in the completion of the MDP which was contrary to the totality of the evidence adduced of the IC. The finding must, therefore, be considered wrong in principle for being perverse and factually baseless.

[46] In respect of the EDP, the IC accepted the appellant's unchallenged evidence that the EDP module had been completed as per schedule and the only thing which was pending was the presentation by the EDP participants.

[47] Upon our perusal of the written award of the IC, we are of the view that the Learned Chairman ('LC') took the correct approach in inquiring into the charges against the appellant as follows:

> [18] ... the Industrial Court is a proper forum to rehear any matter, even in the absence of a domestic inquiry. In *Wong Yuen Hock v Syarikat Hong Leong Assurance Sdn Bhd and another appeal* [1995] 2 MLJ 753, the court held that 'the statutory requirement of 'due inquiry' before dismissing an employee under s 14(1) of the EA does not excuse the Industrial Court from discharging its duty to enquire into the question of 'just cause or excuse' ad required by s 20 of the IRA.

[48] The LC also stated the law correctly that the company (respondent) ought to take into account its own findings although the IC has the discretion to rehear all the evidence and issues regardless of whether a DI has held or not.

[49] This is consistent with the principle in *Wong Yuen Hock v Syarikat Hong Leong Assurance Sdn Bhd and another appeal* [1995] 2 MLJ 753 and does not fall foul of the said principle. The LC duly noted the contents of the letter of termination, particularly that it seemed to suggest that the appellant had been found guilty of all seven charges when in fact she had been found guilty of only charges 2 and 3.

[50] Thereafter, the LC proceeded to examine charges 2 and 3 and the surrounding facts together with the explanation of the appellant in regard to the allegations of misconduct under both the charges before coming to his conclusion as to whether the dismissal was with just cause or excuse.

[51] From our analysis of the LC's written award and the material facts pertaining to the charges, we are satisfied that the LC had properly considered the charges and sufficiently analysed the evidence presented before him to justify his finding.

[52] Importantly, the LC correctly gave due consideration to the fact that the respondent company failed to present any evidence before the IC as to why it did not wish to be bound by the findings of its own DI panel in respect of the charges for which the appellant was found not guilty or to prove otherwise at the IC proceedings.

[53] The LC rightly held that had the respondent done so, the IC would be in a good position to consider the merits or demerits of the findings. In the circumstances, the IC was left with the only available alternative, which was to consider the findings on charges 2 and 3 only in deciding as to whether the dismissal was with just cause or excuse.

[54] Another vital fact, which was duly highlighted by the LC was that, on a perusal of the letter of termination, it does not clearly indicate the charges the claimant is said to be guilty of. Instead, it seems to suggest that the domestic inquiry had found the claimant guilty of all the charges and that the charges are serious in nature.

[55] Having carefully considered the evidence, facts and issues in respect of both the said charges, the IC made its findings on the principal issue for determination as follows:

> In respect of charge 3, it was found that:
>
> [28] ... the claimant should have exercised more care and diligence in ensuring that all matters that she had taken over from the previous General Manager be completed satisfactorily. However, this court does not find this oversight as serious and deserve a dismissal from her position. The company could have taken other administrative actions that are within its Code of Conduct, which should not include a dismissal.

[56] As regards charge 2, the LC found that the appellant's explanation was not rebutted by the respondent. In fact, the wording of the charge was too general and not specific. The phrase 'some of the graduates' used in the charge as being affected by the appellant's failure or omission was too broad an accusation to implicate her.

[57] Most importantly, no satisfactory evidence had been adduced to prove that there was a group of personnel whose career progressions had been impeded as alleged which the LC had correctly taken into account in making his finding.

[58] The IC concluded on charge 2 that even if the appellant's omission may be regarded as misconduct, it did not have all the hallmarks of serious misconduct that would justify her dismissal.

[59] At the IC the respondent had contended that the appellant's performance as a manager was below par in years 2015/2016. However, the IC found that there was a dearth of evidence to support this allegation considering the fact that she had worked for about 13 years with a largely unblemished record.

[60] No evidence was tendered that she had been placed under a Performance Improvement Plan. The LC took cognizance of these relevant facts before arriving at his verdict.

[61] The above contention was in fact the basis of charges 5 and 6 where it was alleged that the appellant had neglected her responsibilities by not making regular communications/follow-up with the training provider. Namely, Malaysian Institute of Management ('MIM'). However, as found by the LC, the evidence adduced in the IC proved otherwise.

[62] The IC, in its analysis of the facts and documentary evidence that were produced, accepted the appellant's version that she was not the person in charge of the EDP. Her evidence at the IC on this point was largely unchallenged that she had not neglected her responsibility of communicating with the MIM.

[63] On the totality of the evidence at the IC, the primary allegation of delay in the completion of the MDP and EDP by the appellant had not been proved. Hence, the finding of the IC that the allegation of the appellant having neglected or failed to perform her managerial duties in accordance with the functions entrusted to her was without basis was a correct finding that was consistent with the weight of evidence.

[64] Likewise, in the LC's view, based on the said evidence, the DI panel's finding/verdict that the appellant was not guilty of charges 1, 4, 5 and 6 was correctly made and the same ought to be upheld in the absence of any evidence to the contrary adduced by respondent at the IC as noted by the LC.

[65] To touch briefly on charge 7, which the DI panel found the appellant not to be guilty of, the respondent had raised the issue that the appellant had allegedly failed to provide guidance and/or clear direction to her subordinates in discharging their responsibilities.

[66] Our view is that no reason had been shown by the respondent at the IC to justify interference with the finding of the DI panel on charge 7. Again, the appellant's denial of the charge at the IC was unchallenged without evidence to the contrary by the respondent to suggest otherwise.

[67] As pointed out by the appellant, charge 7 was not even put to the appellant during her cross-examination in the IC.

(See the Court of Appeal's decision in *Aik Ming (M) Sdn Bhd & Ors v Chang Ching Chuen & Ors and another appeal* [1995] 2 MLJ 770.)

[68] We have duly noted that the LC was conscious of the role of the IC in a reference under s 20 of the IRA as pronounced in the landmark Federal Court case of *Milan Auto Sdn Bhd v Wong Seh Yen* [1995] 3 MLJ 537; [1995] 4 CLJ 449 that the function of the IC is as follows:

> As pointed out by this court recently in *Wong Yuen Hock v Syarikat Hong Leong Assurance Sdn Bhd and another appeal* [1995] 2 MLJ 753, the function of the Industrial Court in dismissal cases on a reference under s 20 is twofold firstly, to determine whether the misconduct complained of by the employer has been established, and secondly whether the proven misconduct constitutes just cause or excuse for the dismissal. Failure to determine these issues on the merits would be a jurisdictional error which would merit interference by certiorari by the High Court.

[69] As taken cognizance of by the LC of the IC, the onus lies on the company to prove, on a balance of probabilities that the dismissal was for just cause or excuse.

(See *Telekom Malaysia Kawasan Utara v Krishnan Kutty a/l Sanguni Nair & Anor* [2002] 3 MLJ 129; [2002] 3 CLJ 314.)

[70] Having considered the proven charges against the appellant, the LC addressed the primary issue for determination and concluded as follows:

> [39] Was there misconduct by the claimant? This court is of the opinion that the company would have been right to caution and discipline the claimant in manner befitting the negligence, or omission of responsibilities entrusted upon her but to dismiss her on grounds of misconduct, in unconscionable.

[71] The LC's view, based on the facts and circumstances surrounding the appellant's dismissal was that the outright dismissal was duly harsh, unreasonable and wholly disproportionate to the offences committed or omissions by the appellant.

[72] Moreover, the respondent was found to have not produced supporting evidence to either show poor performance. Neither had the respondent relied on the evidence at the proceedings of the DI to show the same.

[73] It was plain that the IC had given serious consideration to the issue of proportionality of the punishment which was consistent with its role under a s 20 reference. It was not shown that the IC had acted irrationally, unreasonably

or had taken into account irrelevant considerations or immaterial facts in arriving at its conclusion.

[74] We, therefore, see no flaw or manifest error in the approach taken by the IC and the conclusion reached as adverted to. We however agree with the LHCJ that the law on judicial review is now well settled that the court may review a decision of a public authority in the exercise of public duty or function on the grounds of illegality, irrationality or procedural impropriety.

[75] In the recent Federal Court case of *Peguam Negara Malaysia v Chin Chee Kow (sebagai setiausaha Persatuan Kebajikan dan Amal Liam Hood Thong Chor Seng Thuan) and another appeal* [2019] 3 MLJ 443; [2019] MLJU 202, the grounds for judicial review were reiterated in the following passage:

> [60] This landmark decision moved the courts from a position of deciding whether prerogative power existed to deciding if they were being carried out lawfully. Lord Diplock in his speech at P 401D of the *GCHQ* case enunciated three classic grounds for judicial review:
>
> Judicial review has I think developed to a stage today when ... one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call 'illegality', the second 'irrationality' and the third 'procedural impropriety' ...
>
> By 'illegality' as a ground for judicial review I mean that the decision maker must understand correctly the law that regulates his decision making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.
>
> By 'irrationality' I mean what can now succinctly be referred to as 'Wednesbury unreasonableness' (*Associated Provincial Picture Houses, Limited v Wednesbury Corporation* [1948] 1 KB 223. It applies to a decision which is so outrageous in it defiance of logic or of accepted moral standards that no reasonable person who had applied his mind to the question to be decided could have arrived at it.

[76] However, from our perusal of the IC award together with the grounds of decision of the LC, we do not agree with the LHCJ that the IC had committed an error of law in its award that would warrant interference on judicial review.

[77] The LHCJ's reasoning as to why the IC had committed the said error is encapsulated in following paragraph of her judgment:

> [15] ... It is the court's considered view that the finding made by the Industrial Court was wrong in law and fact. The company did give effect to the DI panel's findings of guilty of two out of the seven charges and in addition to the two charges took into account the seriousness of all the charges and the respondent's past adverse record of service in deciding the appropriate punishment imposed on the respondent.

[78] It bears reiteration that the LHCJ had failed to bear in mind that the company (respondent) had given due weight and consideration to the severity of all the charges when in fact the appellant had not been found guilty of five out of the seven charges by the DI panel.

[79] Despite doing so, the respondent chose not to produce any evidence at the IC why it had disregarded the findings of the DI panel on the five charges and instead, chose to being forth her purported past adverse record of service to justify her outright dismissal.

[80] For all intents and purposes, her past record comprised unproven charges for which no evidence was tendered at the IC. As remarked by the LC, there was a dearth of evidence on her alleged poor performance as a manager.

[81] From our understanding of the principle in *Hong Leong Equipment Sdn Bhd*, the IC is not required in law to brush aside the findings of the DI panel in the event that a DI is held. In our view, the principle is that the IC is required to hear the industrial dispute afresh regardless of whether a DI is held which is a wholly irrelevant factor. Hence, the IC had not erred in taking into consideration the respondent's failure to present any evidence as to why the impugned findings of the DI panel should be disregarded to the detriment of the appellant.

[82] As emphatically remarked in *Wong Yuen Hock v Syarikat Hong Leong Assurance Sdn Bhd and another appeal* the primary function of the IC on a reference under s 20 of the IRA is to determine whether the employer had established the misconduct complained of.

[83] Here, the alleged misconduct was as described in the letter of termination. The IC had heard and considered all the facts and evidence presented by the employer and the appellant as a whole before coming to a finding of fact that the misconduct as alleged therein that would justify a dismissal had not been proved.

[84] In our considered view, it was erroneous for the LHCJ to reassess the IC's finding of fact that was not shown to be plainly wrong or wrong in principle and come to a contrary conclusion on the ground that there was enough evidence before the IC including the appellant's past record of service to uphold her dismissal.

[85] It is important to note that the LHCJ had nowhere in her judgment explained as to how the IC had acted unreasonably or irrationally in its evaluation of the evidence of both parties and the approach that it had taken in its findings on the appellant's dismissal.

[86] Merely expressing the view that the IC had erred in fact and law when making its findings when there was enough evidence of the appellant's past record of service from the witnesses called by the respondent would not, in principle, be sufficient ground to disturb the finding of the decision maker who was entrusted to conduct an inquiry into the complaints made by the employer against the employee.

[87] The LHCJ should, instead, have focused on the charges levelled against the appellant and whether the finding of fact by the IC was reasonable on the totality of the evidence that the dismissal was without just cause or excuse.

[88] In a judicial review, it was not within the purview of the High Court to reassess and revaluate the evidence which is function of the decision maker.

[89] In our view, the IC was entirely correct in holding that the respondent was not entitled to reassess all the charges preferred against the appellant at the DI and dismiss her based on the same without producing evidence to contradict the findings of the DI panel.

[90] It would, otherwise, have the effect of finding the appellant guilty of all seven charges in direct contradiction to the said findings which the LC was right to reject consistent with equity and good conscience.

[91] We also hold the view that the LHCJ had erred in principle when she held that the IC had given too much weight on finding an appropriate punishment for respondent disregarding the most important consideration that the respondent had been holding the position of manager for about 13 years in the Human Resource Department, the past adverse record of service and consequence of her acts and omissions to the company.

[92] The LHCJ's finding is in direct conflict with the established principle enunciated in the case of *Wong Yuen Hock v Syarikat Hong Leong Assurance Sdn Bhd and another appeal* as to the second primary function of the IC being to decide whether the proven misconduct constitutes just cause or excuse to justify the dismissal.

[93] This is exactly the approach adopted by the IC in determining whether the dismissal was fair and just without emphasis on the appellant's purported past history. We must emphasize that the appropriate punishment must be based on the proven misconduct and not on past warning letters and penalties imposed on the employee as erroneously held by the LHCJ in accordance with the principle of proportionality.

[94] We are convinced that the IC's decision that the most severe penalty of dismissal was without justification was not flawed or a serious error that merited interference by the High Court based on its finding on the nature of the misconduct and the facts and circumstances of this case.

[95] We are satisfied that the appellant stated the law correctly that the IC is clearly entitled to take the view that the appellant's oversight or omission was not a serious misconduct and decide the appropriate penalty for the same in light of the Federal Court's decision in *Norizan bin Bakar v Panzana Enterprise Sdn Bhd* [2013] 6 MLJ 605; [2013] 9 CLJ 409 which held at p 410 as follows:

> *The Industrial Court could substitute its own view, in place of the employer's view, as to what should be the appropriate penalty for an employee's misconduct.* The doctrine of proportionality of punishment was inbuilt into the Industrial Relations Act and *the Industrial Court was duty bound to decide, using that doctrine, whether a proven misconduct constituted just cause or excuse for dismissal. The Industrial Court had the jurisdiction to decide whether dismissal was too harsh a punishment in the circumstances when ascertaining an award under* s 20(3) of the IRA (paras 36, 37 & 39).

[96] It was common ground that the appellant had served the respondent for a continuous period of 13 years at the time of her dismissal. We find that the IC had correctly considered this material fact and invoked the doctrine of proportionality to hold that the appellant's dismissal by the respondent was unduly harsh, unreasonable and wholly disproportionate to the offence committed by the appellant.

[97] In our view, the LHCJ appears to have erroneously failed to direct her mind to the application of this important doctrine in reversing the IC's decision on the penalty of dismissal.

CONCLUSION

[98] For the aforesaid reasons, our conclusion would be that the IC as the decision maker in its quasi-judicial capacity had reached a wholly reasonable decision based on the facts and evidence before it.

[99] It was not a decision that was irrational, contrary to material facts or a decision that any other tribunal similarly circumstanced would not have reasonably arrived at.

[100] Lastly, our view is that the High Court clearly fell into error by exceeding its jurisdiction in a judicial review proceeding by overturning the findings of fact by the IC which were not tainted with any manifest errors of law or fact. The grounds of this appeal clearly have merits as we have adverted to.

[101] We, therefore, allow this appeal and set aside the decision of High Court and accordingly reinstate the IC award. By consent, we order no costs here and below.

Appeal allowed, decision of the High Court set aside and the IC award reinstated.

Reported by K Selvaraju